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Public Prosecutor v Muhammad Taufik Hidayat

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05(LB)-52–01 OF 2017 (IDN)
AHMADI ASNAWI, KAMARDIN HASHIM AND KAMALUDIN MD SAID JJCA
26 JULY 2018

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Criminal Procedure — Appeal — Appeal against acquittal and discharge — Accused person charged for trafficking in dangerous drugs — Defence of innocent carrier — Whether defence probable — Whether defence raised reasonable doubts on prosecution's case — Whether accused person innocent carrier — Whether safe to acquit and discharge accused person — Dangerous Drugs Act 1952 s 39B(1)(a)

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The respondent was arrested at the Immigration Complex, Kedah when white crystal substance was found concealed in the bag which he was carrying. The white crystal substance was later discovered to be 2,081.84g methamphetamine. The respondent was charged at the High Court for trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Satisfied that the prosecution had proved a prima facie case, the respondent was called to enter his defence. In his defence, the respondent submitted that he was an innocent carrier without knowledge of the drugs in the bag. The judicial commissioner ('the JC') held that the respondent had created reasonable doubt on the prosecution's case. The respondent was acquitted and discharged. Hence, the present appeal by the appellant ('the prosecution'). The prosecution argued that the JC erred in: (a) deciding that the respondent had successfully proven the defence of innocent carrier; and (b) relying on a letter written by the respondent's counsel as part of the defence's evidence ('exh D1').

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Held, allowing appeal:

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(1) Even though the defence of innocent carrier is a valid defence, ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise, every accused person will allude to that defence and it needs more than that. The defence of innocent carrier had not been successfully raised by the respondent. Despite all the opportunities available for him to check the contents of the bag and despite the suspicious circumstances surrounding the whole scheme of the events, respondent chose to turn a blind eye. The characters he mentioned were clearly fictitious characters and there was not an iota of proof of existence for the court's

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consideration. The JC had also taken into consideration the concept of wilful blindness. However, His Lordship had erroneously considered the facts and circumstances before coming to a wrong conclusion that the respondent was not guilty of wilful blindness (see paras 23–25).

(2) Immediately after receiving the bag, the respondent went to Hat Yai and continued his journey to cross the border on the pretext to visit his brother in Klang. However, this was not part of the job he was supposed to do. If it was so, why should he bring along the bags with him. He should have left them behind since he had to come back to Bangkok to take a flight to Medan. The conduct and action of the respondent should raise suspicion that he travelled to Malaysia to deliver the drugs to someone in Malaysia (see para 28).

(3) The JC held that the existence of the character named Iwan, Dedi, April Naldi and the appellant's brother, Deni, had been established thrugh exh D1. The JC erred when His Lordship made a reference on exh D1. The JC was wrong when His Lordship put such heavy reliance on the content of exh D1 in coming to the conclusion that the defence was not an afterthought (see paras 20 & 29).

(4) The charge of trafficking had been proven beyond reasonable doubt against the respondent. There were merits in the prosecution's appeal. The order of acquittal and discharge by the High Court was set aside and substituted with an order that the respondent be found guilty and convicted of the trafficking charge. The respondent was sentenced to mandatory death penalty (see paras 35–36).

[Bahasa Malaysia summary

Responden ditangkap di Kompleks Imigresen, Kedah apabila bahan kristal putih ditemui tersorok di dalam beg yang dibawa olehnya. Bahan kristal putih ini kemudiannya didapati merupakan 2,081.84g methamphetamine. Responden didakwa di Mahkamah Tinggi kerana mengedar dadah berbahaya, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Berpuas hati bahawa pihak pendakwaan telah membuktikan satu kes prima facie, responden dipanggil membela diri. Dalam pembelaannya, responden menghujahkan bahawa dia seorang pembawa tidak bersalah tanpa pengetahuan tentang dadah di dalam beg tersebut. Pesuruhjaya kehakiman ('PK') berpendapat bahawa responden berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan. Responden dilepaskan dan dibebaskan. Oleh itu, rayuan ini oleh perayu ('pendakwaan'). Pihak pendakwaan menghujahkan bahawa PK terkhilaf apabila: (a) memutuskan responden berjaya membuktikan pembelaan pembawa tidak bersalah; dan (b) bergantung pada surat yang ditulis oleh peguam responden sebagai sebahagian keterangan pembelaan ('eksh D1').

Diputuskan, membenarkan rayuan:

(1) Walaupun pembelaan pembawa tidak bersalah adalah pembelaan yang sah, kejahilan sepenuhnya tidak cukup untuk membiarkan tertuduh terlepas sebaliknya kerana setiap orang yang dituduh akan menyatakan pembelaan ini dan ini memerlukan lebih daripada itu. Pembelaan pembawa tidak bersalah gagal dibangkitkan oleh responden. Walaupun terdapat banyak peluang untuknya menyemak isi beg dan walaupun terdapat keadaan yang mencurigakan mengelilingi keseluruhan keadaan, responden memilih menutup mata terhadap ini. Watak-watak yang disebutkannya adalah watak-watak yang jelas-jelas rekaan dan tidak ada keterangan tentang kewujudan mereka untuk dipertimbangkan oleh mahkamah. Pesuruhjaya kehakiman juga telah mengambil kira konsep kebutaaan sengaja. Walau bagaimanapun, beliau terkhilaf dalam mempertimbangkan fakta dan keadaan sebelum membuat kesimpulan yang salah bahawa responden tidak bersalah bagi kebutaan sengaja (lihat perenggan 23–25).

(2) Sejurus selepas menerima beg tersebut, responden pergi ke Hat Yai dan meneruskan perjalanannya untuk menyeberangi sempadan atas alasan melawat abangnya di Klang. Walau bagaimanapun, ini bukan sebahagian daripada tugas yang sepatutnya dilakukannya. Jika begitu, mengapa dia membawa beg bersama-samanya. Dia sepatutnya meninggalkan beg-beg tersebut kerana terpaksa pulang ke Bangkok untuk mengambil penerbangan ke Medan. Tingkah laku dan tindakan responden harus menimbulkan syak wasangka bahawa dia ke Malaysia untuk menyerahkan dadah kepada seseorang di Malaysia (lihat perenggan 28).

(3) Pesuruhjaya kehakiman memutuskan bahawa kewujudan watak bernama Iwan, Dedi, April Naldi dan saudara perayu, Deni, telah dibuktikan oleh eksh D1. Pesuruhjaya kehakiman terkhilaf apabila membuat rujukan pada eksh. D1. Pesuruhjaya kehakiman terkhilaf apabila beliau meletakkan kebergantungan berat pada kandungan eksh D1 untuk menyimpulkan bahawa pembelaan ini bukan satu fikiran terkemudian (lihat perenggan 20 & 29).

(4) Pertuduhan pengedaran telah dibuktikan tanpa keraguan munasabah terhadap responden. Terdapat merit dalam rayuan pihak pendakwaan. Perintah pembebasan dan pelepasan Mahkamah Tinggi diketepikan dan diganti dengan perintah bahawa responden didapati bersalah dan disabitkan dengan pertuduhan pengedaran. Responden dijatuhkan hukuman mati mandatori (lihat perenggan 35–36).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Aminata Sanoh v PP [2015] 1 LNS 247, CA (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Kazem Habibi Hassan v PP [2014] 6 MLJ 622, CA (refd)
Mr Losali v PP [2011] 4 MLJ 694; [2012] 2 CLJ 178, CA (refd)
Munuswamy Sundar Raj v PP [2015] 6 MLJ 214; [2016] 1 CLJ 357, FC (refd)
Paul Anayo Madubugwu v Pendakwa Raya [2015] MLJU 2143; [2015] 1 LNS 431, CA (refd)
Pendakwa Raya v Herlina Purnama Sari [2016] MLJU 1824; [2017] 1 MLRA 499, CA (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 181, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), 39B(2), First Schedule

Appeal from: Criminal Trial No 45A-02–01 of 2015 (High Court, Alor Setar)

Diya Syazwani Izyan Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Mohd Irwan bin Sumadi (Selvi Sandrasegaran with him) (Gooi & Azura) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] The respondent, an Indonesian national, was charged and tried in the High Court at Alor Star with an offence of trafficking in the dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable with mandatory death penalty under s 39B(2) of the same Act.

[2] The charge reads:

> Bahawa kamu pada 5 Ogos 2014, lebih kurang jam 2.30 petang, di Unit Pemeriksaan Penumpang Bas/Pejalan Kaki, Kompleks Imigresen, Bukit Kayu Hitam dalam Daerah Kubang Pasu, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu Methamphetamine sejumlah 2,081.84 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] At the end of the prosecution's case, the learned High Court judicial commissioner ('the learned JC') found that the prosecution had succeeded in establishing a prima facie case against the respondent and had ordered the respondent to enter upon his defence. After considering the defence's case, the

learned JC acquitted and discharged the respondent holding that the respondent had created reasonable doubt on the prosecution's case. The learned JC held that the respondent is an innocent carrier without knowledge of the impugned drugs hidden in the luggage carried by the respondent.

[4] Aggrieved with the acquittal, the public prosecutor appealed to this court. We heard the appeal on 9 July 2018, and after hearing the parties, we unanimously allowed the prosecution's appeal. We now give our reasons in allowing the appeal.

THE PROSECUTION'S CASE

[5] The prosecution's case was well encapsulated in the learned JC's grounds which may be summarised as follows. On 5 August 2014, at about 1.30pm, customs officer Rusnita bt Zakaria ('PW4') saw the respondent carrying a brown coloured bag (P6) walking to the immigration check-point at Immigration Complex, Bukit Kayu Hitam, Kedah. PW4 instructed the respondent to place P6 into the scanning machine to which the respondent obliged. Upon scanning P6, PW4 then instructed the respondent to place P6 on the inspection counter for a physical examination and at the same time PW4 requested the respondent to produce his passport for verification.

[6] PW4 then instructed the respondent to open the bag P6 for inspection. The respondent told PW4 that the bag contained women's shoes. When P6 was opened, PW4 saw a smaller black coloured bag ('P21') inside. PW4 then instructed the respondent to open the bag P21 for inspection. Upon repeated requests made by PW4, the respondent reluctantly opened the bag P21 for PW4 to inspect its contents. According to PW4, the respondent was rather furious over the request to open P21 for inspection.

[7] Upon inspection, PW4 found four pairs of women's shoes in wedge design in P21. Three pairs were blue in colour (P22 to P27) and a pair in black (P28 and P29). PW4 lifted the shoes and found they were rather unusually heavy. PW4 told her colleague, senior customs officer Habibullah bin Ishak ('PW6') of her discovery of the suspicious image and women's shoes which were unusually heavy. PW6 came and inspected the women's shoes, and he also found them to be unusually heavy.

[8] PW4 then instructed the respondent to bring the women's shoes to the scanner machine for scanning. The respondent was escorted by PW6 to the scanner machine. The scanning revealed there were similar dark image in all the shoes' heels. PW4 then instructed the respondent to place the women's shoes (P22 to P29) back into the P21's bag and then to place P21 back into P6 as before. PW4 then instructed the respondent to wait in one of the rooms at the

A complex. PW6 watched over the respondent in the said room while waiting for customs officer from the Narcotics Unit to arrive. PW6 had contacted his supervisor, senior customs officer Azizan bin Abdullah ('PW8') from the Narcotics Unit.

B **[9]** About an hour later, PW8 and a team of customs officers arrived. PW4 related to PW8 what she had discovered. PW4 then handed over the respondent P6, P21 and the respondent's passport ('P88') to PW8. PW8 then took the respondent and all the exhibits to the Customs Narcotics Office.

C **[10]** At the office, PW8 did a random selection of passengers' bags for the purposes of inspection. PW8 placed P6 together with seven other bags in a single file. The other seven bags were from other passengers who were at the scene. PW8 then ordered customs officer Ravi a/l Thangaveloo ('PW7') who came with a drug-sniffing dog named 'Tera' to go through the bags in a single
D file. PW7 testified that 'Tera' reacted positive to the presence of drug substance in the respondent's bag ('P6'). Thereby, the respondent and the exhibits were taken back to the Customs Narcotics Office in Alor Star for further investigation.

E **[11]** At the Customs Narcotics Office, PW8 carried out a thorough inspection on P6 in the presence of the respondent. PW8 found P21 inside P6. Upon emptying P6, PW8 found P6 was rather unusually heavy. PW8 inspected the emptied P6 and he found the side wall unusually thick. PW8
F ripped open the inside wall of P6 and found a packet wrapped in white plastic tape ('P67') containing white crystal substance.

[12] PW8 also found another packet wrapped in white plastic tape ('P69') containing white crystal substance concealed in P21. PW8 also found
G concealed inside the heels of the four pairs of women's shoes small packets of plastic which contained white crystal substance as well (P71, P73, P75, P77, P79, P81, P83 and P85). PW8 weighed all the packets and found that the combined weight of the packets was 3.329kg.

H **[13]** PW8 then prepared the necessary documentations and lodged a police report ('P101'). Subsequently, PW8 handed over the respondent and all the exhibits including the suspected drugs exhibits to the investigating officer, assistant director of customs Jayadevan Naidu a/l Ponnusamy ('PW10') for further action.

I **[14]** On 7 August 2014, PW10 sent the suspected drugs exhibits to the chemist, Nus Izzati bt Suib ('PW3') for analysis. PW3 analysed the white crystal substance found in P67, P69, P71, P73, P75, P77, P79, P81, P83 and P85 and confirmed that they were methamphetamine with a total weight of

2,081.84g. PW3 also confirmed that methamphetamine is listed under the First Schedule of the Act. PW3's chemist report was tendered and marked as P66.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[15] The learned JC had considered and accepted the evidence of PW3 on the analysis undertaken by the witness. The learned JC was satisfied that through the evidence of PW3, it was proven that the white crystal substance found in P67, P69, P71, P73, P75, P77, P79, P81, P83 and P85 were dangerous drugs, to wit methamphetamine with a total weight of 2,081.84g, the subject matter of the charge.

[16] The learned JC had undertaken a maximum evaluation of the evidence of all the prosecution's witnesses and was satisfied that the prosecution had made out a prima facie case against the respondent on the offence charged. The learned JC gave his reasons as at pp 19–21 of the appeal record, Vol 1, as follows:

> [47] Firstly, the accused was seen carrying with him P6 at the immigration check-point at the Immigration Complex, Bukit Kayu Hitam. P6 was positively identified as the bag which was carried by the accused by SP4 who had instructed the accused to place P6 for scanning.
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> [48] Secondly, P21 was found inside P6, and the women's shoes were found in P21. The accused himself removed P21 from P6. The accused himself told SP4 there were women's shoes in P21.
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> [49] Thirdly, SP6 had witnessed too that P6 and P21 were with the accused at that material time, and that the women's shoes were kept inside P21. The incriminating drugs were found concealed in P6, P21 and the women's shoes (P22 to P29). Clearly, from the prosecution's evidence, the accused was in close proximity to the incriminating drugs which were kept in P6, P21 and P22 to P29. This fact could make out a strong inference that the accused was in custody of the incriminating drugs.
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> [50] Fourthly, the fact that the accused was in custody of P6 and P21 and the contents therein, an inference could be made out that the accused could have the power to deal with the incriminating drugs as owner to the exclusion of all other persons, and when the circumstances were such that he might be presumed to intend to do so in case of need. This fact could establish that the accused had full control over the incriminating drugs.
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> [51] Fifthly, the accused was found to have had in his custody and under his control P6, P21, P22 to P29 which containing the incriminating drugs, and pursuant to s 37(d) of the DDA 1952, until the contrary is proved, the accused shall be deemed to have been in possession of such incriminating drugs and shall, until the contrary is proved, be deemed to have known the nature of such incriminating drugs.
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> [52] Sixthly, the accused was caught in the act of carrying P6, P21, P22 to P29

where the incriminating drugs were found being concealed, and the act of carrying is defined in s 2 of the DDA 1952 to include within the definition of 'trafficking'. The total weight of the incriminating drugs is 2,081.84 grammes which is way above the weight that an inference could be made out for own consumption of the accused. Further, the concealed incriminating drugs was an overt act sufficient to infer as an act of trafficking. Based on these findings, this Court was satisfied that the accused was in fact in the act of trafficking as envisaged in the definition of s 2 of the DDA 1952.

[53] Seventhly, the testimony of SP3 confirmed that the crystal white substances found inside P67, P69, P71, P73, P75, P77, P79, P81, P83 and P85 were methamphetamine which is listed in Part III First Schedule of the DDA 1952. The substance and the total weight of the methamphetamine was not challenged in the prosecution's case.

[54] Lastly, this Court had considered carefully the movement of the exhibits of the incriminating drugs in the prosecution's case, and this Court found there was no gap in the chain of evidence of these exhibits.

[17] After being satisfied that all the elements of the charge had been established, the learned JC found that the prosecution had proven a prima facie case against the respondent. Thus, the respondent was called upon to enter his defence on the preferred charged.

THE DEFENCE

[18] The respondent elected to give evidence under oath. The evidence of the respondent was recorded in great detailed by the learned JC in his grounds which we reproduced as follows:

[57] The accused's narrative was that back in Indonesia in his hometown he was offered a job by his friend named Iwan to travel to Bangkok to bring back some samples of children's clothing and shoes which he had ordered, and at the same time to source for samples of Baju-Melayu. The accused told the court that Iwan was in clothing business.

[58] The accused accepted the offer. The instruction to him was to go Bangkok and meet with a person by the name of Dedi and Dedi will hand over some samples of children's clothing and shoes to the accused. He was also instructed to travel to Hat Yai and Chiang-Mai to source for more clothing samples. The accused told the court that Iwan will send some sample photos of the clothes' designs via hand-phone to him while he is in Thailand.

[59] Iwan introduced one April Naldi to the accused before he left for Bangkok. April Naldi was asked by Iwan to arrange for the accused's passport to travel to Bangkok. At the same time, April Naldi gave his ATM card ('P42') to the accused in case he needed any cash to use on his journey in Bangkok.

[60] On 3 August 2014, the accused arrived in Bangkok. He checked in to a hotel booked by Iwan, but he could not remember the name of the hotel. On the

following day (4 August 2014), Iwan contacted the accused and informed him that Dedi will be seeing him and to pass him some samples of children's clothing and shoes.

[61] After Iwan contacted the accused, Dedi came and brought along a bag containing children's clothing and a smaller bag containing women's shoes. The accused could not identify and confirm P6 and P21 were the two bags handed to him by Dedi. Dedi suggested to the accused that he should place his own clothes in the same bag so that he could easily travel around. The accused followed Dedi's suggestion, and he then travelled to Hat Yai the next day (5 August 2014) with the bag brought by Dedi. The accused was instructed to go Hat Yai by Iwan.

[62] The accused travelled to Hat Yai from Bangkok by bus. When the accused reached Hat Yai, Iwan sent some photos of sample clothing to him. While the accused was in Hat Yai, he received a phone call from his brother who stayed in Kuala Lumpur. The accused's brother, Dani, told the accused that he would like to meet the accused in Kuala Lumpur.

[63] The accused then informed Iwan that he would like to travel to Kuala Lumpur to meet his brother. Iwan granted the accused permission to go to Kuala Lumpur to see his brother, said the accused.

[64] The accused bought a bus ticket from Hat Yai to go to Kuala Lumpur. He arrived at the Immigration Complex in Bukit Kayu Hitam in the afternoon. He was requested to place the bag which he brought along with him into the scanning machine. The bag which he was carrying belonged to Iwan, said the accused. After the bag was scanned, two customs officers approached him and wanted to inspect the bag.

[65] The customs officers removed all the items from the bag and placed every item into to the scanner one by one. The accused told the Court that he did not stop the customs officer from inspecting the bag. The accused narrated that after the scanning the customs officers arrested him and told him that they saw suspicious items in the bag from the scanner images.

[66] He was brought into a room. Later a team of customs officers arrived with a dog. The customs officers took his bags and placed his bags with other bags for sniffing by the dog. After that, he was brought to an office where thorough inspection was carried out on the bag. The customs officers found the incriminating drugs concealed in the bag ('P6') and the smaller bag ('P21') as well, the accused said.

[67] The accused said he was shocked to know that there were drugs found in the bags and told the customs officers that the bags belonged to Iwan. The accused also asked for permission to contact Iwan, the owner of the bags. The accused said that the customs officer did not respond to his request.

[68] The accused said that he did not admit the bags were his nor did he admit that the crystal white substances were 'syabu'.

[69] The accused told the court that he informed SP10 that the bags belonged to Iwan, and Iwan's hand phone number was stored in his hand-phone. But, SP10 did not contact Iwan, the accused said.

A [70] The accused also told the court that he did inform SP10 how he obtained the bags in Bangkok and from whom he had received the bags and why he went to Bangkok. He further told the court that he accepted Iwan's offer because he was unemployed. He trusted Iwan and worked for him. After his arrest by the Malaysia authority, he was unable to contact Iwan anymore because he could not remember
B Iwan's hand phone number.

[71] In the defence case, Muhamed Marzuki, SD2, was called to give evidence. In gist, SD2 confirmed that there was no CCTV recording at the Immigration Complex at the material time because the recording was not functioning. The CCTV recording had not been functioning for several months, SD2 said.

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[19] As we alluded to earlier, at the end of the defence case after considering the defence version, the learned JC found that the respondent had succeeded in raising a reasonable doubt on the prosecution's case. The learned JC accepted
D the respondent's defence of an innocent carrier without knowledge of the impugned drugs concealed in P6, P21 and P22 to P29. The learned JC as well found that the respondent had succeeded in rebutting the statutory presumption of knowledge and possession under s 37(d) of the Act earlier invoked by him against the respondent. The respondent was thus acquitted and
E discharged. Hence the appeal before us.

THE APPEAL

[20] Before us, the learned deputy public prosecutor ('learned DPP') posited
F only one main ground of appeal namely that the learned JC erred when his Lordship decided that the respondent had successfully proven the defence of an innocent carrier. The learned JC erred further when he relied on exh D1, which was a letter written by the respondent's counsel as part of the defence's evidence. In her submission, learned DPP relied on *Munuswamy Sundar Raj v Public*
G *Prosecutor* [2015] 6 MLJ 214; [2016] 1 CLJ 357, *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240, *Aminata Sanoh v Public Prosecutor* [2015] 1 LNS 247, *Paul Anayo Madubugwu v Pendakwa Raya* [2015] MLJU 2143; [2015] 1 LNS 431, and *Mr Losali v Public Prosecutor* [2011] 4 MLJ 694; [2012] 2 CLJ 178 for us to allow the appeal.

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OUR DELIBERATION AND DECISION

[21] The learned JC had accepted the defence of innocent carrier without knowledge put forth by the respondent. We agreed with the learned DPP's
I complaint that the learned JC erred in law and fact when His Lordship decided that the respondent had successfully proven the defence of an innocent carrier. The learned JC erroneous conclusion was based on the following propositions:

(a) the learned JC believed the respondent's narrative that he was asked to go to Bangkok not just to take the samples of children's clothing back to

Medan, but he was also asked to source for other samples of clothing in Hat Yai and Chiang-Mai, to which it did not raise any suspicious circumstances that the items carried by the respondent contained drugs;

(b) the learned JC made a finding that even PW8 had said that P6 looked normal and therefore it would not cross the respondent's mind that there could be something hidden in P6. Because of that, there was no necessity for the respondent to do an inspection on P6 although he had the opportunity to carry it out himself; and

(c) the learned JC was swayed by the evidence of the respondent that he was poor and he accepted the job from Iwan as he needed the money.

[22] The learned JC's handling of the respondent's defence on innocent carrier without knowledge can be seen at pp 28–29 of the appeal record, Vol 1, which is as follows:

> [79] The learned deputy public prosecutor challenged the accused that it would not make sense why Iwan would want to send the accused all the way to Bangkok just to bring back the samples of children's clothing and women's shoes. The costs would be much cheaper if those sample items were to send by post from Bangkok to Medan, instead of paying the accused's expenses to fly him there and come back. This argument may have certain degree of truth. However, the accused's narrative was that he was asked to go Bangkok not just to take the samples back to Medan, he was also asked to source for other samples of clothing in Hat Yai and Chiang Mai. For this reason, it would not raise any suspicious circumstances that the items the accused was carrying had incriminating drugs concealed in them. The accused was supposed to get other samples of clothing from Hat Yai or Chiang Mai too.
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> [80] SP8 agreed that P6 looked normal. This could be a fact that it did not cross the mind of the accused that there could be something hidden in P6. The weight and look of P6 did not raise the suspicious of the accused. If the accused did not suspect anything wrong from the outset, he would not have asked or inspected P6, P21, P22 to P29 although he had the opportunity to ask and carry out an inspection or had the chance to examine the items.
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> [81] The learned deputy public prosecutor raised the question that the accused ought to feel suspicious when he received P6 from Dedi since he had not met Dedi before. The accused told the Court that he did not feel anything unusual because he was instructed by Iwan to meet this person by the name of Dedi, and was told that Dedi will pass him some samples of clothing. The accused also told the Court that he trusted Iwan, because he knew Iwan for many years. He took up Iwan's offer because he was unemployed for 5 years and needed money, the accused said.
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> [82] Iwan agreed to pay the accused Indonesia Rupiah 2 million (approximately RM650.00) for the job. If someone is poor, and a job was offered to him by someone whom has known for many years, the person would accept the job without question and would definitely feel grateful. Why would he question who Dedi was, and why should the accused feel suspicious of Dedi passing P6 to him despite him not knowing who Dedi was? The accused was merely carrying out what he was

instructed to do by Iwan. Receiving P6 with the contents therein was the purpose of his trip to Bangkok.

[83] What other fact could there be for the accused to suspect the incriminating drugs were hidden in P6, P21, P22 to P29 other than those facts which have already been discussed above. This Court is of the considered view that there was insufficient evidence to show that the accused could have suspected the fact that incriminating drugs were hidden P6, P21, P22 to P29, and yet the accused refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. In the absence of any evidence that could infer the accused could have suspected the incriminating drugs hidden in P6, P21, P22 to P29, therefore, the accused could not have asked further, or inspected or examined P6, P21, P22 to P29.

[23] Eventhough the defence of innocent carrier is a valid defence but ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every accused person will allude to that defence and it needs more than that. The Federal Court in *Munuswamy Sundar Raj v Public Prosecutor*, Suriyadi Halim Omar FCJ explained the principle in the following terms:

[8] We were rather perturbed by the above remarks as that is not the correct proposition of law in drug trafficking cases. The defence of innocent carrier is a valid defence that could be alluded to by an accused person, and in this case the appellant. A plethora of cases sprinkles the legal journals in Malaysia and suffice if we merely refer to a chosen few to clarify this defence without the need for comprehensive judicial activism. The Court of Appeal in *Venkatesan Chinnasami v Public Prosecutor* [2011] MLJU 1530; [2011] 1 LNS 1736 put it aptly in the following terms:

> ... A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or a box, as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the fact of each case.

[9] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance *simpliciter* is not sufficient to let an accused person off the book as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence. A hypothetical scenario could be when an accused person receives a package which contains illicit drugs from say, England when not a shred of evidence could establish him having been aware of the circumstances of the drugs being sent to him or having any nexus to him. Prior to the parcel appearing at his door step he would not have had any reason for suspicion or the opportunity to inspect the parcel bearing in mind that the package was beyond his reach until it reached his hands. The rider is that everything depends on the facts.

[10] Let us now peruse briefly at the relevant parts of the evidence regarding the current case where every opportunity was made available to the appellant to inspect

the bag. It was noticeable that there was no suggestion by the defence that the appellant had enquired from the person who handed the two boxes to him or such a suggestion was made to any of the prosecution's witnesses of the contents. He was in a position to examine the contents of the bag entrusted by that Faruk before it was checked in but failed to do so. He was clearly guilty of wilful blindness (see *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240 (CA) and *Public Prosecutor v Amil bin Akmad* [2007] 5 MLJ 561; [2007] 4 CLJ 688 (CA)). In *Hoh Bon Tong v Public Prosecutor* when discussing this defence held that:

> The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438), 'the concept of wilful blindness qualifies the requirement of knowledge'. And His Lordship continued further by saying (at the same page):
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> > As Professor Glanville Williams aptly remarked in his textbook on *Criminal Law*, at p 125:
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> > > ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truth is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know', he is taken to know'.
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> Continuing at the same page, His Lordship said:
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> > In *Ubaka v Public Prosecutor* [1995] 1 SLR 267, the principles laid down in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v Public Prosecutor* [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
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> > > Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciteris not enough.*

[11] In order not to throttle the discretion of judges, let alone no cases are similar, we are loath to lay down restrictive guidelines for courts to consider prior to deciding whether the defence of innocent carrier can prevail. We leave it to the better judgment of the presiding judge. In the case of *Marlan Marpaung v Public Prosecutor* [2013] 1 MLJ 108; [2012] 8 CLJ 41 the court had occasion to say:

> The defence of the appellant cannot stand in isolation. It must be determine by reference to the facts and circumstances prevailing in each particular case (*Ridwan v Public Prosecutor* [2010] 4 CLJ 570; *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240; and *Wong Vui Chin v Public Prosecutor* [2009] MLJU 1703; [2011] 3 CLJ 383). In our judgment, the appellant could not avail himself of the defence of innocent carrier because there was ample evidence to show that the appellant had knowledge of the drugs that he was carrying. The contemporaneous conduct of the appellant by fleeing the scene and putting up a struggle with the police party before the discovery of the drugs would have a direct bearing on the facts in issue and would have certainly damaged or whittled away the presumption of innocence on the part of the

A appellant. A reasonable tribunal appraised of the facts and after hearing this appeal would have concluded that the appellant was not an innocent carrier and that the appellant knew that he was carrying the drugs in the black plastic bag ('exh P24') for the purpose of trafficking.

B **[24]** We observed from the learned JC's grounds of judgment that His Lordship had taken into consideration the concept of wilful blindness. Nevertheless, he had erroneously consider the facts and circumstances prevailing in the instant appeal before coming to a wrong conclusion that the respondent was not guilty of wilful blindness. The learned JC had merely paid C a lip service to the doctrine of wilful blindness in his judgment.

[25] We had the advantage of perusing through the appeal record. We are of the considered view that the defence of innocent carrier had not been successfully raised by the respondent. Despite all the opportunities available for D him to check the contents of P6 and despite the suspicious circumstances surrounding the whole scheme of events, the respondent choose to turn a blind eye. The characters of Iwan and Dedi were clearly fictitious characters and there was not an iota of proof of their existence for the court's consideration.

E **[26]** In *Paul Anayo Madubugwu*, this court through Rohana Yusuf JCA (now FCJ) had this to say on a similar issue:

> [16] The learned judge had also given due consideration to the defence of innocent carrier premised on his defence of lack of knowledge. In her judgment the judge F found that the appellant should have every reason to suspect when given the three heavy cylinders to be carried. Yet, having the chance and opportunity to examine, he did not to do so. Instead he choose to turn a blind eye which the learned judge rightly found to be his own folly. The appellant's wilful blindness would not support a defence of innocent carrier as decided by this court in *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240. G

[27] We find that the learned JC erred in coming to a conclusion and in accepting the respondent's version that since the respondent was poor and in need of money, the respondent had every right to take the job tasked by Iwan H without the need to ask any further and inspect the contents of P6 from Dedi and he took out his own belonging's from his own bag and put them in P6. The respondent realised at that time that there were children's clothings, women's shoes and the bag P21 inside P6. He had every opportunity and ample time to check but he did not. Therefore, the respondent is guilty of wilful blindness.

I **[28]** We also observed that the respondent immediately after receiving the bag P6, went to Hat Yai and continued his journey to cross the border on the pretext to visit his brother, Deni in Klang. However, this is not part of the job he was supposed to do but he asked permission from Iwan to go to Klang. If it

is so, why should he bring along P6 and P21 with him. He should have leave it behind since he has to come back to Bangkok anyway to take a flight back to Medan on 20 August 2014. The conduct and action of the respondent as such should arose suspicions of the learned JC's mind that the respondent travelled to Malaysia non other than to deliver the impugned drugs to someone in Malaysia. His story of visiting his brother in Klang is just an afterthought and recent invention. After all he did not even know where was his brother stayed in Klang.

[29] We observed that the learned JC had ruled that the defence of the respondent was not an afterthought. The learned JC made reference to a letter written by the respondent's lawyer (exh D1) which was a representation letter on a 'without prejudice' basis. We agreed with the learned DPP's complaint that the learned JC erred when he made reference to this letter exh D1. The learned JC was wrong when he put such heavy reliance on the content of ex. D1 in coming to the conclusion that the defence is not an afterthought. The learned JC held that the existence of the characters named Iwan, Dedi, April Naldi and the respondent's brother Deni has been established through the said letter.

[30] With regards to the learned defence counsel's contention that the phone number of Iwan can be found as '?' in the respondent's Nokia phone (exh P37), PW10 had on his own, investigated and had listed the numbers detailed from the said phone in a six paged document. The defence counsel nevertheless strongly objected to the putting in the said document eventhough part of learned defence counsel's complaint was for the non investigation of Iwan's phone number. The learned JC upheld the objection and had failed to evaluate this fact.

[31] In a more recent decision of the Court of Appeal in *Pendakwa Raya v Herlina Purnama Sari* [2016] MLJU 1824; [2017] 1 MLRA 499 on the same issue of wilful blindness, Raus Sharif PCA (as His Lordship then was) at great length said:

> 42. In our judgment, that the manner in which the impugned drugs, were concealed in the two boxes which were found in the respondent's luggage goes to show that the respondent knew the contents of the two boxes. It is not enough for the respondent to merely assert absence of knowledge. On the facts, there are many reasons for the respondent to be suspicious that the luggage she was carrying contained impugned drugs. But she wilfully shut her eyes. It is preposterous to accept the respondent's defence that she had agreed to carry something in the luggage to help Jo, a total stranger, to have the two boxes delivered to Jo's friend in Laos.
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> 43. In our assessment, looking at the evidence in totality, the respondent could not exculpate herself from her involvement in the trafficking of the seized drugs by saying that she had not knowledge or that she was an 'innocent' when she

voluntarily agreed to hand over the boxes to a third party that she hardly knew in another country without enquiring further as to the contents of the said boxes. The respondent, without any such inquiry, which she wound have been reasonable expected to make in any event, had agreed to give the boxes to someone just as a favour for her friend Vivian. The respondent should have refused to carry out such an assignment if no satisfactory explanation as to their contents was forthcoming from Vivian whom she was in contact with. Her failure to do so makes her guilty of wilful blindness.

44. Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and couplet with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge. From all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses (see *Public Prosecutor v Tan Kok An* [1996] 1 MLJ 89; [1995] 4 MLRJ 256).

45. The concept of 'wilful blindness' had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Hong Pung How CJ (Singapore) in the case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424. The doctrine of 'wilful blindness' can be summarized to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness'. In other words he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.

46. Most of the cases where the concept was held to apply concerned cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to dispel or to set straight such suspicions. Should the accused not make any or any sufficient inquiries under those circumstances, the concept of wilful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those contents. In other words, if he deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know' he is taken to know.

47. In the present case, based on the evidence, it is our view that the respondent is not an innocent carrier but a trafficker. As we have alluded to earlier, in essence the defence of innocent carrier raised by the respondent has no merit because the respondent had every opportunity to check for herself what she was carrying. In our judgment any reasonable person similarly circumstanced would have asked what

were in those boxes. The respondent here is not a hapless victim caught in the web of inevitable circumstances beyond her control. We find no ring of truth in her story.

[32] As regards the fact that the impugned drugs were securely concealed in the bags and women's shoes, we echoed the view of Yong Pung How CJ (Singapore) in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 181 as follows at p 187:

> ... In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
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> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR(R) 104 (at [51]):
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> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

[33] In *Kazem Habibi Hassan v Public Prosecutor* [2014] 6 MLJ 622 the appellant was found guilty and sentenced to death by the High Court on a charge of trafficking in 1,394g of methamphetamine at the baggage collection centre at the arrival hall at Kuala Lumpur International Airport. After noticing that the appellant was entering and exiting a toilet several times after collecting a bag, customs officers at the airport approached the appellant and took him to the Narcotics Office for a body search which revealed he was wearing an abdominal girdle containing the drugs. The sole issue raised by the appellant in the instant appeal against his conviction and sentence was that he had no knowledge about the drugs. To support that contention, the appellant claimed he was requested by a friend ('Mehdi') in Tehran to bring with him computer crystals for sale to a buyer in Malaysia. The appellant claimed that although he did not see the crystals himself, Mehdi told him they were placed within the girdle to be worn around the waist for the purpose of evading tax. The trial court found that as the prosecution had proven the appellant had custody and control of the drugs, his knowledge of the drugs could be presumed under s 37(d) of the Act. A DNA chemist testified at the trial that the appellant's DNA was found on the transparent plastic within the girdle which contained the drugs as well as on the sides of the girdle raising the inference the appellant must have handled the plastic containing the drugs. The trial court held that

A although the appellant had raised the existence of Mehdi during the prosecution's case, it did not amount to anything more than a denial because no details of Mehdi were given to enable police to investigate the matter further.

B **[34]** It was upon the respondent to make sufficient, inquiries so as to dispel or to set straight the suspicions. In this appeal, the failure of the respondent in not making any inquiries attract the concept of wilful blindness so as to fasten upon him the necessary knowledge as to the contents of the two bags P6, P21 and the women's shoes. The deliberate conduct of the respondent of shutting his eyes to the obvious because he does not want to know the true and actual C contents of the bags and women's shoes are taken to know that there were drugs in them.

CONCLUSION

D **[35]** Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it is our unanimous finding that the charge of trafficking had been proven beyond reasonable doubt against the respondent.

E **[36]** For all the reasons above stated, we hold that there were merits in the prosecution's appeal. We, therefore, allowed the appeal. We set aside the order of acquittal and discharge by the High Court and we substituted it with an order that the respondent be found guilty and convicted of the trafficking charge. We ordered the respondent to be sentenced to the mandatory death F penalty.

Appeal allowed.

Reported by Afiq Mohamad Noor

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